APPEALS FOR TRIAL PROSECUTORS

November 17, 2017
APAAC Training Center
Phoenix, Arizona

STATE'S APPEALS, SPECIAL ACTIONS, DIRECT & CROSS APPEALS, RULE 32 PROCEEDINGS & HABEAS CORPUS

Presented By:

ANDREA KEVER
Deputy Maricopa County Attorney
Phoenix, Arizona

ALICE JONES
Assistant AZ Attorney General
Phoenix, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Rd., Suite 202
Phoenix, Arizona 85015

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Alice Jones
Arizona Attorney General's Office
Alice.Jones@azag.gov

Andrea Kever
Maricopa County Attorney's Office
kever@mcao.maricopa.gov

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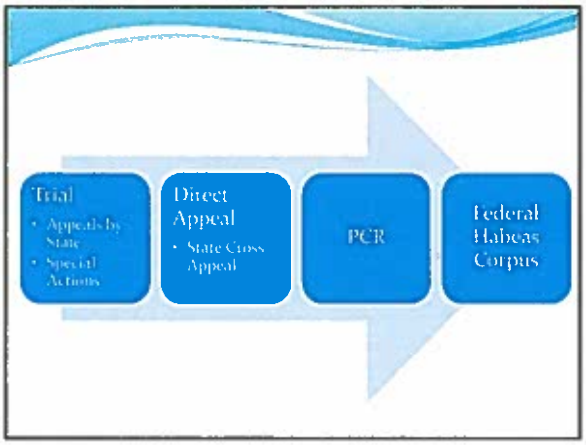
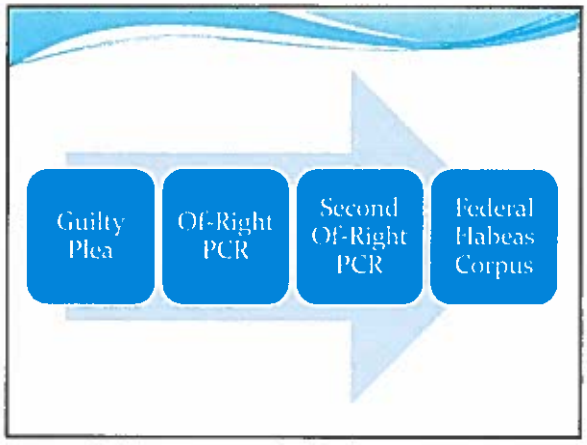
We will use a hypothetical case to discuss the different types of "appeals" that can arise in a felony case in superior court.

Please feel free to ask questions!





Felony Case in Superior Court
State v. DiCaprio

- Facts of the crimes:

After getting into a heated argument, Leonardo DiCaprio shoots and kills George Clooney.

Brad Pitt tries to intervene and DiCaprio points a gun at Brad.

State v. DiCaprio - Charges

- State presents case to grand jury and DiCaprio indicted on two charges:
  - Count One – First-degree murder (George Clooney)
  - Count Two – Aggravated Assault (Brad Pitt)

Appeals by the State

- A.R.S. § 13-4032 governs when the State may appeal.
- State can appeal:
  - Order dismissing a charging document;
  - Order granting a new trial;
  - A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment;
  - A post-judgment order affecting the substantial rights of the state or a victim, only if victim requests appeal;
  - An illegal sentence;
  - Order granting motion to suppress the use of evidence; and
  - A post-verdict judgment of acquittal.

Appeals by the State

- Criminal Rules of Procedure 31 governs this appeal.
  - New rules take effect in January 2018.
- Must file notice of appeal within 20 days of order being appealed. Ariz. R. Crim. P. 31.2(a)(2).

Special Actions

- Special action jurisdiction is discretionary and appropriate only when there is no equally plain, speedy, and adequate remedy by appeal.
- Be sure to consult rules of procedure for special actions.
- Time-frames for special actions are quick.
  - Typically 7 days to respond.
  - Be sure to check whether the Court of Appeals has already declined jurisdiction before you write a response.

Special Actions

- Record must be adequate for review of an issue.
  - Submit an appendix with relevant record and cite to it in the petition.
  - Appendix should include:
    - Relevant written motions and responses.
    - Relevant exhibits admitted at evidentiary hearings.
    - Relevant written court rulings.
    - Relevant transcripts.
- Appendix must be filed separately, with table of contents and bookmarks or hyperlinks.

Special Actions

- Review of Court of Appeals decision by petition for review to Arizona Supreme Court
  - Note: Not a special action in Supreme Court; it will be a civil case and governed by Arizona Rules of Civil Appellate Procedure.
- 30 days to file petition for review
  - Must attach decision of Court of Appeals, or Superior Court decision if Court of Appeals declines jurisdiction.
  - Response due 30 days after service of Petition.
  - No reply unless ordered by Court.

Special Actions

- Common issues raised by defendant on special actions:
  - Denial of bond
  - Motions for remand to the grand jury
  - Double Jeopardy claim after initiation of second prosecution
  - Speedy trial/Rule 8 claims

State v. DiCaprio – Grand Jury

- Motion for remand to grand jury – Alleging prosecutor failed to give a justification instruction to the jury. *See Cespedes v. Lee*, 243 Ariz. 46 (2017).
- A defendant must challenge a decision denying a motion for remand by special action before trial.
- If a motion to remand is granted, State can challenge by special action. If an indictment (or other charging document) is dismissed, State may file an appeal. *See* A.R.S. § 13-4032(1).

State v. DiCaprio - Special Action/Appeal #1

- When police arrived on scene, DiCaprio made some admissions prior to receiving *Miranda* warnings.
- DiCaprio files motion to suppress his statements based on an alleged *Miranda* violation.
- Trial court grants motion to suppress – State's remedy is to file an appeal. *See* A.R.S. § 13-4032(6). If statements are necessary for case and you have a good argument, consider filing an appeal. In hypothetical case, State appealed and prevailed when the Court of Appeals held DiCaprio was not "in custody" when he made incriminating statements.
- If trial court had denied motion to suppress – DiCaprio could have tried to file special action. In a response, be sure to note that a defendant has remedy to raise issue on direct appeal.

Suppression Issues Generally

- Make a thorough record.
- Make alternative arguments or lose them on appeal.
  - E.g. Good-faith exception, inevitable discovery, and independent source doctrine.
- Leave hearing exhibits in the record and use other copies for trial.

State v. DiCaprio – Special Action #2

- DiCaprio seeks subpoenas for Brad Pitt's counseling records and other records related to his divorce. The trial court grants request over the State's and victim's objection.
- State files special action.

- Think about filing special actions to protect victim's information if entirely unnecessary to a defense and request only made for harassment.
  - Be sure not relevant to a defense.

State v. DiCaprio – Special Action #3

- Mid-trial, DiCaprio files a special action to challenge a trial court's ruling.
- Unless DiCaprio gets a stay, trial will continue at the same time the Court of Appeals is considering the special action.
- Rule 65 of the Rules of Civil Procedure governs stays.
  - Must first file request for stay in trial court.
    - If denied, then go to Court of Appeals (must file with special action petition).

State v. DiCaprio – Rule 20/Verdict

- DiCaprio makes a Rule 20 motion to the court regarding both counts; the trial court denies the motion as to Count 1, but grants it as to Count 2.
- Remedy?
  - There is no remedy. State may not appeal a trial court's pre-verdict grant of a judgment of acquittal. *See Evans v. Michigan*, 568 U.S. 313, 318 (2013).
- State may appeal a post-verdict judgment of acquittal. *See* A.R.S. § 13-4032(7).

State v. DiCaprio – Direct/Cross Appeals

- DiCaprio files a timely notice of appeal (within 20 days of sentencing).
- State can cross-appeal, and must file notice within 20 days after service of defendant's notice of appeal. Ariz. R. Crim. P. 31.2(a)(2)(C).
- Please let the Criminal Appeals Section of the Attorney General's Office know if you file a cross-appeal. Preferably by letter that can be put in the file.

State v. DiCaprio – Cross Appeal

- Trial judge imposed a sentence of life with the possibility of release in 25 years for Count 1, which was based on premeditated first-degree murder.
- A.R.S. § 13-752(A) requires a natural life sentence. Thus, the sentence is illegally lenient.
- The State MUST file a cross-appeal to remedy an illegally lenient sentence.

Direct Appeals Generally

- Governed by Arizona Rule of Criminal Procedure 31.
- After notice of appeal is filed, the record is sent from trial court to court of appeals and transcripts are prepared.
  - Contents of record – Rule 31.8(a).
  - Transcripts – Rule 31.8(b).
  - Must file designation of record within 30 days of filing notice of appeal.
  - Can supplement record by court order.
- The record is the universe on appeal.

Direct Appeals Generally

- Once record complete, clerk files completion of the record.
  - Opening brief due 40 days after clerk distributes notice.
  - Answering brief due 40 days after service of Opening Brief.
  - Reply brief is optional and due 20 days after service of Answering brief.
- Contents of brief governed by new Rule 31.10.
  - Only have to cite to Arizona reporter.
  - Use victim identifier for juveniles or victims of sexual offenses.

Direct Appeals Generally

- When briefing is complete, case is assigned to a 3-judge panel of the Court of Appeals.
- Court of Appeals could hold oral argument (usually only does so if requested).
- Court of Appeals will either issue a memorandum decision or a published opinion.
  - Memorandum decisions issued on or after January 1, 2015 may be cited for persuasive value.
    - Must attach or provide a link to a free copy (not Westlaw).

Direct Appeals Generally

- Motions for reconsideration governed by new Rule 31.20.
  - Must be filed within 15 days of decision.
  - Cannot respond to motion for reconsideration unless ordered by the court.
- Petitions for review governed by new Rule 31.21.
  - Must file within 30 days of decision or 15 days from final disposition of a motion for reconsideration.
  - Response, if filed, due 30 days after service of petition.

State v. DiCaprio – Direct Appeal

- DiCaprio files an opening brief raising four issues:
  - (1) Sufficiency of the evidence;
  - (2) Prosecutorial misconduct;
  - (3) *Miranda* violation; and
  - (4) Challenging admission of 404(b) evidence.

State v. DiCaprio – Direct Appeal

- (1) Sufficiency of the Evidence.
  - This issue is subject to *de novo* review; No deference given to trial court.
  - Seminal case is *Jackson v. Virginia*, 443 U.S. 307 (1979)
    - Arizona case: *State v. West*, 226 Ariz. 559 (2011).

State v. DiCaprio – Direct Appeal

- (2) Prosecutorial misconduct – Alleging the prosecutor committed misconduct during closing argument.
  - No objection below.
  - Fundamental error review. *See State v. Henderson*, 210 Ariz. 561 (2005).
  - Defendant must prove:
    - (1) Error occurred;
    - (2) The error was fundamental—"error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial"; and
    - (3) Resulting prejudice.

State v. DiCaprio – Direct Appeal

- (3) *Miranda* violation
  - This was same issue already litigated in State's pre-trial appeal and Arizona Court of Appeals issued a decision.
  - Law of the case would likely apply.
  - If court did review issue, deference is given to the trial court's factual determination, but legal conclusions reviewed *de novo*.

State v. DiCaprio – Direct Appeal

- (4) Challenging admission of 404(b) evidence.
  - This issue litigated at hearing below and, thus, reviewed for an abuse of discretion.
  - Be sure to be specific about why other-act evidence is admissible and relevant to the case; do not just generally list reasons contained in Rule 404(b).
  - When an issue is preserved, State has burden of proving harmless error.
    - Constitutional v. non-constitutional error.
      - Constitutional – Harmless beyond a reasonable doubt
      - Non-constitutional – Reasonable probability the verdicts would have been different

State v. DiCaprio – Direct Appeal

- Arizona Court of Appeals issues memorandum decision affirming conviction and sentence.
- DiCaprio files petition for review to Arizona Supreme Court, which is summarily denied.
- DiCaprio could file petition for writ of *certiorari* to the United States Supreme Court on federal issues.
  - Must file within 90 days of Arizona Supreme Court order.

Post-Conviction Relief

- A post-conviction relief (PCR) proceeding typically follows a direct appeal.
  - Although, an appeal can be suspended pending a Rule 32 proceeding. *See* Ariz. R. Crim. P. 31.3(b).
- Governed by Rule 32 of the Arizona Rules of Criminal Procedure.
- A defendant initiate by filing PCR Notice, within the *later* of:
  - 90 days after entry of judgment and sentence; or
  - 30 days after the issuance of the order and mandate in the direct appeal. *See* Ariz. R. Crim. P. 32.4(a)(2)(D)

Post-Conviction Relief

- For guilty pleas, defendants can initiate an "of-right" PCR proceeding.
  - Defendants can also initiate a second "of-right" PCR proceeding to challenge the effectiveness of Rule 32 counsel in the first of-right proceeding.
  - Timeliness
    - 1st of-right proceeding – 90 days after sentencing
    - 2nd of-right proceeding – 30 days after final order or mandate in 1st of-right proceeding
    - Note: Mailbox rule applies to time limitations in Rule 32.
    - *See* Ariz. R. Crim. P. 32.4(a)(2)(C).

Post-Conviction Relief

- There are three mutually exclusive paths to preclusion of claims:
  - Rule 32.2(a)(1) – Defendant still has time to raise claim on appeal or Rule 24 motion.
  - Rule 32.2(a)(2) – Defendant already raised the claim and it was adjudicated on the merits.
  - Rule 32.2(a)(3) – Defendant never raised the claim when he had a chance to do in trial court, on direct appeal, or in previous Rule 32 proceeding.
- Difference between (a)(2) and (a)(3) very important!

Post-Conviction Relief

- The timeliness rule and preclusion rules only apply to claims raised pursuant to Rule 32.2(a), (b), and (c):
  - (a) Conviction or sentence violates United States or Arizona Constitution.
  - (b) Court lacked jurisdiction to render judgment or impose sentence.
  - (c) Illegal sentence.

Post-Conviction Relief

- The timeliness rule and preclusion rules DO NOT apply to claims in Rule 32.1(d)-(h):
  - (d) The person is being held in custody after the sentence imposed has expired.
  - (e) Newly discovered evidence.
  - (f) The failure to file a timely of-right PCR notice or notice of appeal was not the defendant's fault.
  - (g) Significant change in the law.
  - (h) Actual innocence.
- These claims must be resolved on the merits.

Post-Conviction Relief

- Practice tips:
  - Make separate arguments on timeliness rules and preclusion rules, and be sure to specify which specific preclusion rule applies.
  - Know the difference between of-right PCR proceeding and a non-pleading PCR proceeding.
  - PCR rulings must be clear, or there might be future litigation in federal court.
    - If ruling is unclear, consider filing motions for clarification.

State v. DiCaprio – PCR Proceeding

- DiCaprio initiates a timely PCR proceeding by filing a PCR notice within 30 days of issuance of mandate in direct appeal.
- Trial court will appoint attorney if he not represented and indigent. Ariz. R. Crim. P. 32.4(b).
- DiCaprio must file a petition within 60 days of either appointment of counsel, or, if counsel is not appointed, the later of the filing of PCR notice or order denying appointment of counsel.

State v. DiCaprio – PCR Proceeding

- DiCaprio's attorney files a timely PCR petition raising four claims:
  - (1) Prosecutorial Misconduct.
  - (2) Ineffective Assistance of Trial Counsel related to failure to object to alleged Prosecutorial Misconduct.
  - (3) Erroneous admission of gun expert.
  - (4) Ineffective Assistance of Trial Counsel related to failure to object to admission of gun expert.

State v. DiCaprio – PCR Proceeding

- If DiCaprio's counsel found no arguable claims to raise, would have filed a notice instead of petition, and DiCaprio would have been given option of filing *pro se* petition.
- In an of-right PCR proceeding, counsel must file something similar to an *Anders* brief. *See* Ariz. R. Crim. P. 32.4(d)(2)(A).
  - Court of Appeals case pending on whether trial court must follow *Anders* procedures in a first of-right PCR proceeding.
    - One federal judge has concluded it is required.

State v. DiCaprio – PCR Proceeding

- The State has 45 days to file a response. Ariz. R. Crim. P. 32.6(a).
  - 1st extension for "good cause"
  - 2nd or more extensions for "extraordinary circumstances and after considering the rights of the victim"
- Defendant may file a reply 15 days after service of Response.

State v. DiCaprio – PCR Proceeding

- If all claims untimely, precluded, and/or fail to present a material issue of fact or law, court must summarily dismiss the petition. Ariz. R. Crim. P. 32.6(d)(1).
- If there is a material issue of fact or law, hearing will be set. Ariz. R. Crim. P. 32.6(d)(2).
  - Note: State must notify victim of hearing date, if victim has requested such notice. Ariz. R. Crim. P. 32.6(d)(3).
  - Rule 32.8 governs the evidentiary hearing.

State v. DiCaprio – PCR Proceeding

- (1) Prosecutorial misconduct
  - This is based on the same allegation as on direct appeal, alleging the prosecutor committed misconduct during closing argument.
  - This claim is precluded under Rule 32.2(a)(2) because already adjudicated on the merits in the direct appeal.

State v. DiCaprio – PCR Proceeding

- (2) Ineffective Assistance of Trial Counsel related to failure to object to alleged Prosecutorial Misconduct.
  - This claims argues counsel should have objected on the grounds of prosecutorial misconduct during closing argument.
  - This claim is NOT precluded and must be adjudicated on the merits.
  - IAC claims may only be raised in a PCR proceeding. *See State v. Spreitz*, 202 Ariz. 1 (2002).
    - DO NOT argue IAC claims are precluded from a first Rule 32 proceeding.

State v. DiCaprio – PCR Proceeding

- (3) Erroneous admission of gun expert.
  - This is a claim raised for the first time in a PCR proceeding and could have been raised at the trial court and in the direct appeal.
  - Therefore, it is precluded under Rule 32.2(a)(3).

State v. DiCaprio – PCR Proceeding

- (4) Ineffective Assistance of Trial Counsel related to failure to object to admission of gun expert.
  - Although the substantive claim is precluded, the IAC claim related to substantive claim is not precluded.
  - This claim must be resolved on the merits.
    - Seminal case is *Strickland v. Washington*, 466 U.S. 668 (1984).
      - Two part test: A defendant must show:
        - (1) that his attorney's performance was deficient and
        - (2) that he was prejudiced as a result.
    - Encourage the court to rule on both prongs of *Strickland*.

State v. DiCaprio – PCR Proceeding

- Trial court summarily denies PCR petition.
- DiCaprio could either file a motion for rehearing within 15 days of final order, or a petition for review to the Court of Appeals within 30 days of final order. *See* Ariz. R. Crim. P. 32.9.
- Cross-petition for review may be filed within 15 days of service of petition for review.

State v. DiCaprio – PCR Proceeding

- Failure to raise an issue in a petition for review constitutes waiver of that issue. Ariz. R. Crim. P. 32.9(c)(4)(D).
  - Note: A defendant can incorporate his PCR petition by reference if it is attached as an appendix. Ariz. R. Crim. P. 32.9(c)(5)(A).

State v. DiCaprio – PCR Proceeding

- Response due 30 days after petition is served.
  - Note: AG's Office does not represent State in PCR appeals.
  - The Court of Appeals is now issuing decisions in every PCR case.
    - Consider filing responses.
    - COA decision is very important for habeas proceedings. If it resolves the case incorrectly, could affect habeas review.
      - Consider filing motions for clarification or reconsideration.
- Reply may be filed 10 days after response.

State v. DiCaprio – PCR Proceeding

- Court of appeals affirms trial court in memorandum decision, granting review, but denying relief.
- BUT court generally says claims 1 and 3 are precluded under Rule 32.2(a).
  - This could lead to major problems in federal habeas proceeding.
  - File motion for reconsideration to have court clarify that claim 1 is precluded under Rule 32.2(a)(2) and claim 3 is precluded under Rule 32.2(a)(3).

State v. DiCaprio – PCR Proceeding

- DiCaprio could file petition for review to the Arizona Supreme Court.
  - Deadline is 30 days after decision.
  - Court will either summarily deny review or grant review.
- If federal issue is involved, could file a petition for writ of *certiorari* in U.S. Supreme Court.

Federal Habeas Corpus Proceeding

- What is it?
  - It's the last hope for scoundrels or the last refuge of the innocent.
  - Federal court review of federal constitutional claims first presented in AZ courts.
  - The purpose is to preserve federal constitutional rights; *not* to correct errors of state law.
  - Governed by The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254.

Federal Habeas Corpus Proceeding

- Clear and correct procedural rulings lead to procedural bar of claims in federal court.
- Failure to have clear and correct procedural rulings can lead to *de novo* review of the merits of claims for first time in federal court.
- Merits decisions of state courts deferentially reviewed in federal court, limited to evidence in state court proceeding, and limited to only holdings of U.S. Supreme Court cases.

Federal Habeas Corpus Proceeding

- Habeas petitioner generally has one year after direct review concludes to file federal habeas petition. *See* 28 U.S.C. § 2244(d)(1).
- Statute of limitations is tolled during "properly filed" post-conviction proceeding. *See* 28 U.S.C. § 2244(d)(2).
  - Untimely PCR does not toll statute of limitations. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

State v. DiCaprio – Habeas Proceeding

- DiCaprio files a timely federal habeas petition (within 1 year of conclusion of direct review, excluding time when PCR proceeding was pending).
- If he raises any of his federal claims he presented to state court (*Miranda*, IAC claims, Prosecutorial Misconduct), they will be deferentially reviewed in federal court.
- Any of his state law claims (404(b)), would not be cognizable in a habeas proceeding.
  - It is helpful when decisions differentiate between federal and state law claims.

Questions?

AN APPELLATE PRIMER:

The ABC's of Appeals, Special Actions, & Post-Conviction Relief

May 4, 2012
Black Canyon Conference Center
Phoenix, Arizona

STATE'S APPEALS

Presented By:

JACOB LINES

Deputy Pima County Attorney
Tucson, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Rd., Suite 202
Phoenix, Arizona 85015

APAAC Appellate Primer
May 4, 2012

State's Appeals
Presented by Jacob R. Lines
Deputy Pima County Attorney
Jacob.Lines@pcao.pima.gov

You have received an unfavorable ruling. What do you do?

I like to start with three questions.

1) Why was the judge wrong?

Specifically identify what the judge ruled, why he or she ruled that way, and why you believe it is incorrect.

Is it a question of fact? For example, did the judge accept the Defendant's version of events rather than the officer's version of event?

Is it a question of law? For example, did the judge interpret a statute or rule and rule against you solely on that basis?

It makes a big difference because of the standard of review that will be employed. We will talk about that later.

2) What facts are necessary for our argument?

For example, for an argument that a piece of evidence was seized legally because it was in plain view, we need facts about the officer being in the place legally and about the evidentiary value of the evidence being immediately apparent.

Other examples?

3) Where are those facts in the record?
What is "the record"? Let's look at Rule 31.8(a)(1):

> The record on appeal to the appellate court shall be a certified transcript, all documents, papers, books and photographs introduced into evidence, and all pleadings and documents in the file – (other than subpoenas and praecipes not specifically designated), and if authorized by the appellate court, an electronic recording of the proceeding.

In other words, the record is the court's file plus transcripts. So, if the facts that we need for the argument are not in the pleadings or presented in an evidentiary hearing, we have a problem.

> **TIP**: disclosure is not part of the record. If you have an argument about disclosure, make sure you get specifics in the record, either at an evidentiary hearing or in a pleading. Otherwise, you only have lawyers' arguments in the transcript, and the appeals courts might not find that convincing.

Appeal or Special Action?

Not everything is appealable. By that, I mean that we do not have a right to appeal everything. The State's right to appeal is strictly limited to constitutional or statutory provisions that clearly grant that right. *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990); *State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 340, 767 P.2d 226, 227 (App. 1989), *citing State v. Lelevier*, 116 Ariz. 37, 567 P.2d 783 (1977).

Our appeals statute is A.R.S. § 13-4032:

An appeal may be taken by the state from:

1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
2. An order granting a new trial.
3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request.

5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.

6. An order granting a motion to suppress the use of evidence.

7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

> **NOTE**: subsection 3, the cross-appeal provision, is not as big as it looks. It only grants a right to appeal if we win at trial and then the defendant appeals. Then, the appeals court is only likely to address your issue if they reverse the conviction and remand. Otherwise, they have no need to address it because you already won at trial and it their decision would have no practical effect.

The takeaway lesson is: if it isn't in the statute, then we can't appeal it. You might think about a special action instead. *See State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App. 2008).

<u>Should</u> we appeal this?

Once you figure out that you can appeal something, the question becomes whether you should appeal it. Here are a few of the factors that prosecutors should consider when deciding whether to appeal:

Any other factors?

Justice

Effect on victims

Availability of resources

Ethics

Likelihood of success

The standard of review

Bad facts/good facts?

Effect on future cases

Picking the right battles

Other alternatives: motions to reconsider, rethink trial strategy
And remember – appellants are supposed to lose appeals.

How to appeal

File a notice of appeal. For a sample, email me. If the case is still pending (e.g., the judge suppressed evidence but the case is still alive), file a motion to dismiss for purposes of appeal, citing *State v. Million*, 120 Ariz. 10, 12-15, 583 P.2d 897, 899-902 (1978). This avoids leaving the defendant, and the case, in trial-court limbo during the appeal and guards against speedy trial claims later.

When to appeal

You must file your notice of appeal "within 20 days after the entry of judgment and sentence," or, in a cross-appeal, "within 20 days after service of the appellant's notice of appeal." Ariz. R. Crim. P. 31.3. This means that you must file your notice within 20 of the order being appealed. A motion for reconsideration does not extend the time for the notice. If your notice of appeal is late, the Court of Appeals has no jurisdiction to hear your appeal. *See State v. Limon*, 229 Ariz. 22, 23, ¶¶ 4-6, 270 P.3d 849, 850 (App. 2011).

> TIP: Do you think a motion for reconsideration may work, but worry whether the court will rule in time for you to file a notice of appeal? Try this: file your motion but still file a notice of appeal within your 20 days. Then ask the Court of Appeals to revest jurisdiction in the trial court so it can decide the motion for reconsideration.

What next?

After you file your notice of appeal, file a designation of transcripts within 5 days of your notice. In that designation, list the transcripts that need to be prepared and who the court reporter is for each transcript. Look at Rule 31.8(b)(4) for details. File it in Superior Court and send a copy to the court reporters. From there, the reporters will file the transcripts with the Court of Appeals.

Then what?

When the record is complete, the Court of Appeals will send you an order telling you when your opening brief is due (40 days from the day of that order). Ariz. R. Crim. P. 31.13(a). The appellee will have 40 days to respond, and you will have 20 days to reply. After the briefing is finished, the appeal will be "at issue" and you can start waiting. You can expect to wait for at least a month, usually more, after the briefing is done. In my last 10 appeals, the Court ruled, on average, 2.2 months after the briefing was done.

> **TIP**: for cases involving victims, advise them up front about how long appeals take. Explain the process so they understand why it takes so long.

Your briefs

According to Rule 31.13(c), your opening brief must have the following:

- A table of contents
- A table of citations
- A statement of the case (can be combined with statement of facts)
- A statement of facts (WITH citations to the record)
- A statement of the issues presented for review
- An argument (WITH the proper standard of review and citations to relevant authority)
- A short conclusion stating the precise relief sought.
- An appendix if desired.

Some limited writing advice:

- Remember your audience. It is a panel of dispassionate judges, not a jury.
- Remember your standard of review. This is the question the judges will be asking. In other words, they will not be asking, "Was the State right about this argument?" They will be asking, "Can the State prove from this record that the trial court was wrong to rule like this?"
- Ask for help if you need it.
- Keep it short.

Questions of law, such as interpretation of constitution, statute, or rule, are reviewed de novo. *State v. Nichols*, 224 Ariz. 569, 572, ¶ 12, 233 P.3d 1148, 1151 (App. 2010); *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 7, 210 P.3d 1283, 1285 (App. 2009); *State v. Kelly*, 210 Ariz. 460, 461, ¶ 3, 112 P.3d 682, 683 (App. 2005).

A motion to dismiss is reviewed for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004).

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, 81, ¶ 25, 235 P.3d 227, 234 (2010); *State v. Tucker*, 205 Ariz. 157, 165, 68 P.3d 110, 118 (2003); *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995).

Motions to suppress are reviewed for an abuse of discretion, deferring to the trial court's factual findings but reviewing the legal conclusions de novo. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004).

Findings of fact are upheld unless they are "clearly erroneous." *State v. Burr*, 126 Ariz. 338, 339, 615 P.2d 635, 636 (1980).

After the decision

You get the decision. You win (congratulations!) or you lose (I'm sorry). The next step is a petition for review. Our supreme court is not a court of error. It exists, for the most part, to declare the law. It does not exist to fix every error that may still exist in a case after the Court of Appeals is done. Because of that, a petition for review must explain persuasively why the court should hear the case.

Rule 23(c)(3) of the Arizona Rules of Civil Appellate Procedure explains why petitions may be granted:

> the fact that no Arizona decision controls the point of law in question, a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

In other words, if you want to petition for review, you have a difficult job ahead of you. Look back at those same factors you considered in deciding to appeal. Then it is a good idea to ask someone who has been there before (I like emailing the AG's Office). Send an email to APAAC if you would like some additional perspectives.

If you decide to file a petition for review, you have 30 days to do so. Your petition is your chance to explain to the court why the issue in your case is important enough for it to hear. It is not necessarily about the merits of the case, but about the importance of the issue presented. See Rule 23 of the Civil Appellate Rules for details. The appellee will have 30 days to respond. Then, you wait again. Our supreme court takes a couple of months to decide whether to take review of a case. If it accepts review, it will set a time for briefing on the merits and oral argument. If the court declines review, a mandate will issue from the Court of Appeals, sending your case back to the trial court.

Windows Printer Test Page

You have correctly installed your EPSON WF-3640 Series on EI2017.

PRINTER PROPERTIES

Submitted Time:	11:12:03 AM
Date:	11/13/2017
User Name:	EI2017\bella
Computer Name:	EI2017
Printer Name:	WF-3640 Series(Network)
Printer Model:	EPSON WF-3640 Series
Color Support:	Yes
Port Name(s):	EP1CC627:WF-3640 SERIES
Data Format:	RAW
Printer Share Name:	
Printer Location:	
Print Processor:	winprint
Comment:	
Separator Page	
Location:	
OS Environment:	Windows x64

PRINT DRIVER PROPERTIES

Driver Name:	EPSON WF-3640 Series
Driver Type:	Type 3 - User Mode
Driver Version:	2.32.0.0

ADDITIONAL PRINT DRIVER FILES

C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YDSPKDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YJBCKDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YUMRKDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YBN0KDE.BIN
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YCONKDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YAUDKDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YREDKDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_WATO46.EXE
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YTSKDE.EXE
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YTSKDE.DAT
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YTNTKDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_TTN1KDE.PTN
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_TTN2KDE.PTN
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_TTN3KDE.PTN
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C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YUI1KDE.DLL
C:\WINDOWS\system32\spool\DRIVERS\x64\3\E_YUIPKDE.DLL
...

POST-CONVICTION RELIEF
RULE 32 IN A NUTSHELL
(NON-CAPITAL)

* * *

DIANE MELOCHE
APPEALS BUREAU CHIEF
MARICOPA COUNTY ATTORNEY'S OFFICE

ALICE JONES
UNIT CHIEF COUNSEL
ARIZONA ATTORNEY GENERAL'S OFFICE

JUNE 2017

I. HOW RULE 32 FITS INTO THE GRAND SCHEME:

CONVICTED & SENTENCED:
then what?

CONVICTION
BY
PLEA OR ADMIT PV

1st Of-Right RULE 32

2nd "Of-Right" RULE 32

FEDERAL HABEAS CORPUS
federal court review of
federal constitutional claims
first presented in AZ courts

CONVICTION
BY
TRIAL

DIRECT APPEAL

RULE 32

FEDERAL HABEAS CORPUS

II. TIMELY COMMENCEMENT OF PROCEEDINGS – RULE 32.4

The PCR proceeding is commenced by timely filing a PCR notice with the clerk of the court in which the conviction occurred. Rule 32.4(a).

A. IMPORTANCE OF ADDRESSING TIMELINESS:

-- Impact on State Court Proceedings:

Timeliness affects the types of claims that may be raised in the PCR petition:
--Timely Notice: any claim under Rule 32.1(a) through (h) can be raised.
--Untimely Notice: only claims under Rule 32.1(d) through (h) can be raised.

-- Impact on Federal Habeas Proceeding:

--Rule 32.4(a)'s time requirement is an "independent and adequate" state rule of procedure that poses an absolute bar to federal habeas corpus relief.
--Thus, a trial court's ruling that a PCR proceeding was "untimely" filed prevents tolling of the federal 1-year statute of limitations.
--Be sure timeliness ruling is correct and know difference between rules for pleading and non-pleading defendants; if ruling incorrect, could lead to merits review first time in federal court under *de novo* review and with new evidence.

B. PRISONER MAILBOX RULE:

--A *pro se* Δ's Rule 32 notice is "filed" for purposes of the filing deadline when he delivers it to prison authorities for mailing. *State v. Rosario*, 195 Ariz. 264, 266 (App. 1999), adopting *Houston v. Lack*, 487 U.S. 266 (1988).
--Δ's burden to establish timeliness (*e.g.*, present prison mail logs)
--May require evidentiary hearing

C. 1992 AMENDMENTS TO TIME LIMITS:

--If sentenced after Sept. 30, 1992: Rule 32.4(a) time limits apply.
--If sentenced prior to Sept. 30, 1992: Rule 32.4(a) time limits do not apply to a Δ who is filing his **first** PCR notice.
Moreno v. Gonzalez, 192 Ariz. 131, 135 (1998).

D. OF-RIGHT DEFENDANT – Rule 32.1:

--Entered plea of guilty or no contest;
--Admitted probation violation; or
--Probation automatically violated based upon a plea of guilty or no contest.

1. First Of-Right Proceeding: Rule 32.4(a)
   -- Notice due within 90 days of sentencing;
   -- **Rule 32.1(f)**: if Δ can establish failure to timely file was not his fault, the notice will be considered timely ← litigate if necessary
   -- Timely notice permits *any* Rule 32.1 claim to be raised in PCR Petition.

2. Second "Of-Right" Proceeding: Rule 32.4(a)

--Notice due 30 days after 1st of-right PCR concludes by issuance of:
-Trial court's final order denying relief in 1st PCR proceeding;
-Appellate court's order denying review in 1st PCR proceeding;
-Appellate court's mandate in 1st PCR proceeding.

--Timely Notice: permits ineffective assistance of counsel (IAC) claims against attorney who handled the 1st of-right PCR proceeding. *See State v. Pruett*, 185 Ariz. 128 (App. 1996).

--Other claims under Rule 32.1(a), (b), or (c) should be precluded under Rule 32.2(a). *See infra* pp. 6–10.

--Does Rule 32.1(f) apply to second PCR notice?
State v. Petty, 225 Ariz. 369, 372, ¶8, n. 1 (App. 2010) recognizes that the "of-right" designation is somewhat ambiguous.

Rule 32.1(f) excuses the "failure to file a notice of post-conviction relief <u>of right</u> . . . within the prescribed time" if not Δ's fault.

Rule 32.1 suggests that only the first PCR is the of-right proceeding: "Any person who pled guilty . . . shall have the right to file **<u>a</u>** post-conviction relief proceeding and **<u>this</u>** proceeding shall be known as a Rule 32 of-right proceeding."

Rule 32.4(a) anticipates two PCR rounds in of-right proceedings: "In a Rule 32 of-right proceeding, the notice must be filed . . . within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first [PCR] proceeding."

E. NON-PLEADING DEFENDANTS:

-- Found guilty by court or jury verdict, or
-- Unsuccessfully contested probation violation, and
-- Have right to pursue direct appeal under Rule 31.

1. PCR Notice must be filed within the *later* of:
   -- 90 days after entry of judgment and sentence or
   -- 30 days after issuance of the final order or mandate in the direct appeal

   NOTE: If Δ appeals, the PCR Notice may be filed *at any time prior to the expiration of the 30 days* following issuance of the appellate mandate. *State v. Jones*, 182 Ariz. 432 (1995).

   --If an appeal is pending, the trial court is required to send a copy of the PCR notice to the appropriate appellate court. Rule 32.4(b)

   --The appellate court, on motion of any party or on its own initiative, may stay the appeal pending the outcome of the PCR. Rule 31.4(a).
      --In Maricopa County, the usual practice is to permit Δ to dismiss early PCR notice without prejudice to refiling within 30 days after mandate issues in the direct appeal.

2. An untimely notice filed by a non-pleading Δ cannot be saved under Rule 32.1(f).
   --If Notice is untimely, claims are restricted to those in Rule 32.1(d) – (h).

III. APPOINTMENT OF COUNSEL — Rule 32.4(c)(2):

A. Counsel must be appointed if requested by indigent Δ upon the filing of a timely **or** first PCR notice:
   -- First PCR for any Δ regardless if timely filed
      State v. Gauldin, 2016 WL 796967 (Ariz. App. March 1, 2016)
   -- Second "of-right" PCR only if timely filed
      Osterkamp v. Browning, 226 Ariz. 485 (App. 2011)

B. Is discretionary in all other non-capital cases (*i.e.*, successive PCRs).

IV. DISCOVERY:

A petitioner has no general right to pre-petition discovery, but the State has an obligation to produce any *Brady* material. *Canion v. Cole*, 210 Ariz. 598, 599, ¶¶ 8–9 (2005). After the PCR petition is filed, a petitioner can request discovery and the trial court may order it if the request is related to issues raised in the petition.

V. PRECLUSION — Rule 32.2(a):

A. WHAT IS IT?

Preclusion is an absolute bar to relief on certain claims raised in the PCR petition *and* can limit review in a future federal habeas proceeding.

B. PURPOSE:

To "limit review and prevent endless or nearly endless reviews of the same case in the same trial court." *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 10 (2002.)

To avoid piecemeal litigation by "requiring a defendant to raise all known claims for relief in a single petition to the trial court."
State v. Rosales, 205 Ariz. 86, ¶ 12, (App. 2003).

C. STATE'S BURDEN:

The State must "plead and prove" any ground of preclusion by a preponderance of the evidence standard. The State can affirmatively waive preclusion.

But any court *may* find a claim precluded regardless of whether the State raises preclusion. *See State v. Espinosa*, 200 Ariz. 503 (App. 2001) (noting that State had not plead or proven preclusion but the rule and statute allowed the court *sua sponte* to find the claim precluded).

D. CLAIMS SUBJECT TO PRECLUSION – Rule 32.2(b):

Only the following claims are subject to preclusion:

Rule 32.1(a): any constitutional claims challenging conviction and sentence;

Rule 32.1(b): claims challenging the court's jurisdiction to render judgment or impose sentence;

Rule 32.1(c): claims challenging legality of sentence.

E. THE RULES OF PRECLUSION – Rule 32.2(a):

--There are three specific—**and independent**—rules that apply.
--By definition, only ONE rule of preclusion can apply to a particular claim.
--Identify and apply the correct rule.

Rule 32.2(a)(1): precludes relief on a claim that is *still* "raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24."

--Applies only to non-pleading (trial) Δs who have right to appeal;
--Comes into play when Δ files a PCR before direct appeal has been perfected;
--Refers to Rule 24 motions but highly likely that Rule 24's very narrow time limits will expire before PCR petition is filed [will be the rare case where this applies]

***NOTE*:** Effective 12/1/00, the word "still" disappeared from subsection (a)(1). However, the 2002 Comment to the Rule explains that (a)(1) precludes relief for any claims that "still may be considered" by a trial court under Rule 24, or an appellate court under Rule 31.

--One of the proposed amendments to criminal rules in 2017 would change back to "still raisable."

Rule 32.2(a)(2): precludes relief on a claim that *was raised* in a direct appeal or a prior PCR proceeding *and* was adjudicated on the merits.

-- Applies to both pleading and non-pleading Δs;
-- Prohibits successive "bites at the apple" on the same claim.
-- There must have been a ruling on the merits of the substantive claim in the direct appeal or prior PCR proceeding.

Rule 32.2(a)(3): precludes relief on a claim that *could have been raised but was not* in the trial court proceeding, on appeal, or in any previous collateral proceeding.

--Applies to both pleading and non-pleading Δs.

1. NO FUNDAMENTAL ERROR REVIEW:
   Unlike on direct appeal, there is no fundamental error review in PCR to excuse waiver; that would eviscerate this rule of preclusion.
   State v. Swoopes, 216 Ariz. 390, 403 ¶ 42 (App. 2007).
   --This could change in of-right PCR proceedings; federal court has held that the procedures outlined in *Anders v. California*, 386 U.S. 738 (1967) apply to the trial court review of 1st of-right PCR petition. *See Pacheco v. Ryan*, 2016 WL 740248 (D. Ariz. Dec. 22, 2016).
   --Arizona Court of Appeals case pending on the issue.

2. HOW TO ESTABLISH WAIVER:
   a. For most claims, the State may simply show that the Δ did not raise the claim at trial, on appeal, or in a prior PCR proceeding.

Stewart v. Smith, 202 Ariz. 446, 449, ¶ 8 (2002).

e.g.: Δ failed to submit supplemental *pro se* brief in *Anders*-type appeal, or did file but failed to raise that particular claim.

b. Limited class of rights requiring personal waiver:
Rights that are of "sufficient constitutional magnitude" require a knowing, voluntary, and intelligent (personal) waiver.

Depends merely on the particular right alleged to have been violated. *See Stewart v. Smith*, 202 Ariz. 450, ¶ 10 (2002) for type of rights requiring Δ's personal waiver:

e.g.: waiver of right to counsel; waiver of right to jury trial; waiver of right to 12-person jury.

c. Waiver by entry of guilty plea:
Entry of a valid guilty plea forecloses a Δ from raising substantive non-jurisdictional defects. *State v. Hamilton*, 142 Ariz. 91, 94 (1984); *State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008); *State v. Quick*, 177 Ariz. 314, 316 (App. 1993).

Entry of valid plea waives all constitutional claims occurring prior to entry of guilty plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

e.g.: speedy trial violations; *Miranda* violations; involuntary confessions; 4th Amendment issues; etc.

--Note: double jeopardy and jurisdiction claims may still be raised and not waived by entry of the plea. *See Haring v. Prosise*, 462 U.S. 306, 320 (1983) ("[A] defendant who pleads guilty may seek to set aside a conviction based on prior constitutional claims which challenge 'the very power of the State to bring the defendant into court to answer the charge against him.'" (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974))).

Proof of voluntary waiver:

-- Rule 17 colloquy; Δ's responses to court's questions.

-- Express waivers contained in plea agreement:

MCAO plea agreements contain express waivers:
"Unless this plea is rejected by the court or withdrawn by either party, the Defendant hereby waives and gives up any and all motions, defenses, objections, or requests that he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement.

--No requirement that State address merits of precluded claims:

If the claim is one that does not require Δ's personal waiver, there is no need to address the merits of the claim, *i.e.*, whether the right was actually violated.

--Defendant may still raise claims regarding the voluntariness of the plea, IAC claims related to the voluntariness of the plea, and some sentencing claims. *See, e.g., Hill v. Lockhart*, 474 U.S. 52 (1985) (discussing IAC claims that attack voluntariness of the plea).

NOTE: PRACTICAL APPLICATION of PRECLUSION in State Court Proceedings:

1) Preclusion applies only to *substantive* claims under Rule 32.1(a), (b), and (c). Preclusion does not apply to IAC claims "bootstrapped" onto otherwise precluded claims.

Example: In PCR petition, Δ alleges a *Miranda* violation.

-- If pleading Δ, this substantive claim is waived/precluded by virtue of entry of valid guilty plea.

-- If trial Δ, this substantive claim is waived/precluded because he could have but did not raise it on direct appeal.

BUT if Δ claims that his trial attorney was ineffective for not recognizing the alleged *Miranda* violation, the IAC claim is NOT precluded.

2) IAC claims can be waived/precluded if not timely raised:

--IAC claims against trial/appellate counsel must be raised in a timely first PCR petition.

State v. Spreitz, 202 Ariz. 1, 2 ¶ 4 (2002).

But see State v. Bennett, 213 Ariz. 562, ¶¶ 14–16 (2006):

trial Δ represented by same attorney on appeal and in first PCR can raise IAC/appellate counsel claim in timely second PCR filed by new counsel.

State v. Diaz, 236 Ariz. 361 (2014):

Although Δ timely filed PCR Notice, counsel failed to timely file Petition and proceeding was dismissed w/ prejudice. Acknowledging these unusual circumstances and the State's concession that Δ was not at fault, ASC held that IAC claim presented in third proceeding was not precluded. Trial court should have sanctioned former PCR attorneys for failure to follow time deadlines rather than dismiss proceedings, which punished a blameless Δ.

--IAC claims against first of-right PCR counsel must be raised in timely second "of-right" PCR proceeding. *State v. Pruett*, 185 Ariz. 128 (App. 1996).

--Second of-right proceeding designed to raise this type of claim. *See Osterkamp v. Browning*, 226 Ariz. 485 (App. 2011).

--This is NOT a precluded claim in a second of-right PCR proceeding.

NOTE: PRACTICAL APPLICATION of PRECLUSION in Federal Habeas Proceedings:

The distinction between preclusion under Rule 32.2(a)(2) and (a)(3) is EXTREMELY important for purposes of federal habeas review:

A claim that is precluded under subsection (a)(2) is a classic example of "exhaustion" because that claim has been presented to the State court and, therefore, can be considered by the federal court in a habeas proceeding.

In contrast, a claim that has been waived/precluded under subsection (a)(3) is procedurally defaulted on independent state law grounds and, therefore, the federal court cannot consider that claim (unless Δ later does something that doesn't concern us in the Rule 32 proceeding).

Therefore, it is very important to distinguish between (a)(2) and (a)(3).
There cannot be alternative grounds of preclusion for the same claim—*e.g.*, "a claim is precluded because *it either was or could have been raised* on direct appeal or in a previous post-conviction proceeding." Such broad statements will not be respected on federal habeas review and will open the state court judgment to the federal courts' review on the merits of the claim.

> *See Lambright v.* Stewart, 241 F.3d 1201 (9th Cir. 2001) (refusing to find claim procedurally defaulted in federal court because trial court mentioned both Rule 32.2(a)(2) and (a)(3) and did not clearly identify basis for dismissing the claim); *Valerio v. Crawford*, 306 F.3d 742, 774 (9th Cir. 2002) (reversing the district court's procedural-default finding because the state court "failed to specify which claims had been previously presented to the state court and could not be relitigated, and which had never been presented to state court and had been waived").

In-the-alternative Rulings:
If a run-of-the-mill claim is clearly precluded, there is no need to address the merits of the precluded claim. However, if the merits are discussed *after a clear finding of preclusion,* the order must clearly indicate that any findings made are "in the alternative."

Avoiding unclear rulings: *e.g.*, that a particular claim is "precluded because it either was or could have been raised" earlier or intertwining a preclusion ruling with a ruling on the merits. If the trial court's ruling is unclear, federal courts will presume that the trial court actually ruled on the merits–as opposed to ruling on preclusion–and then the federal courts will have permission to review the merits of the federal claim. *See Harris v. Reed*, 489 U.S. 255, 263-64 (1989) (holding that "a procedural default does not bar consideration of a federal claim . . . unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar" and emphasizing that "a state court need not fear reaching the merits of a federal claim in an alternative holding . . . as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision.") (Internal quotations omitted).

--Consider filing motions for clarification.

F. CLAIMS NOT SUBJECT TO PRECLUSION – Rule 32.2(b):

--"The preclusion rules exist to prevent multiple post-conviction reviews, not to prevent review entirely." *State v. Rosales*, 205 Ariz. 86, ¶ 12 (App. 2003).

--Therefore, claims arising under Rule 32.1(d), (e), (f), (g), and (h) are exceptions to the rules of preclusion and these claims can be raised in an untimely or subsequent PCR.

--However, Rule 32.2(b) expressly requires a Δ to provide a good explanation in the PCR notice why the claim was not raised earlier. Absent a sufficient explanation, the notice is subject to summary disposition.

> **Rule 32.2(b):** "When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, **the notice shall be summarily dismissed**." (Emphasis added).
>
> *See State v. Harden*, 228 Ariz. 131, ¶ 4 (App. 2011) (finding no abuse of discretion when trial court summarily dismissed proceeding based on an insufficient notice).

VI. ENUMERATED GROUNDS FOR RELIEF – RULE 32.1:

A defendant must comply strictly with Rule 32 by asserting in the PCR Petition only those grounds for relief listed in Rule 32.1. A court has no jurisdiction to rule on the merits of a PCR petition where no ground cognizable under Rule 32 is asserted. *State v. Carriger*, 143 Ariz. 142, 146 (1984); *State v. Manning*, 143 Ariz. 139, 141 (App. 1984).

-- *In other words*, if the asserted claim cannot be pigeon-holed into one of the enumerated grounds, it is not cognizable under Rule 32.1 and relief is unavailable.

Rule 32.1(a): The conviction or sentence was in violation of the Constitution of the United States or of the State of Arizona.

A. INEFFECTIVE ASSISTANCE OF COUNSEL — most common claim:
Right to effective assistance at trial, at sentencing, on direct appeal (but not in PCR after direct appeal), at probation revocation proceedings, in plea context, and in 1st of-right PCR.

Two-Prong Test: *Strickland v. Washington*, 466 U.S. 668 (1984):

1. Δ must show DEFICIENT PERFORMANCE:
must specify acts/omissions that allegedly fell below an objective standard of reasonableness as defined by prevailing professional norms;

performance in plea context:
must allege "specific facts which would allow a court to meaningfully assess why that deficiency was *material* to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, (App. 1998) (emphasis added.)

2. Δ must show PREJUDICE:
for trial counsel:
trial:
must demonstrate a reasonable probability that the verdict might have been affected by the error.
Strickland, 466 U.S. 694 (1984)

if plea accepted & no trial:
must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.
Hill v. Lockhart, 474 U.S. 52, 58–59 (1985).

if plea lapsed/rejected & convicted at trial:
must show a reasonable probability that, but for counsel's deficient performance:
i) he would have accepted earlier, more favorable plea to reduced charge(s) and/or lesser sentence;
ii) trial court would have accepted that plea;
iii) prosecutor would not have withdrawn that plea.
Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012)
Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012)

for appellate counsel:
must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different.
State v Herrera, 183 Ariz. 642, 647 (App. 1995).

for PCR counsel:
non-pleading defendant: no constitutional right to effective assistance in PCR following direct appeal.
State v. Armstrong, 176 Ariz. 470, 474–75 (App. 1993) citing *Coleman v. Thompson*, 501 U.S. 722 (1991)

pleading defendant: has the right to effective assistance of counsel in 1st of-right proceeding only;
challenge must be brought in timely 2nd PCR proceeding.
Statev. Pruett, 185 Ariz. 128 (App. 1996).

PRACTICE POINTS:

1) Conclusory allegations, generalizations, or speculation do not establish a colorable IAC claim. *State v. Borbon*, 146 Ariz. 392, 399 (1985); *State v. Rosario*, 195 Ariz. 264, 268, ¶ 23(App. 1999). **Δ must offer specifics.**

2) Although Δ's failure to satisfy both *Strickland* prongs is fatal to an IAC, **THE RULING SHOULD ALWAYS ADDRESS BOTH PRONGS.** Under the federal habeas statute now in effect, 28 U.S.C. § 2254(d), a state court's ruling on the merits of an ineffective assistance of counsel claim under *Strickland* is entitled to deference by federal courts. However, if the state court resolves an ineffectiveness claim on only one *Strickland* prong, there is no state-court merits-ruling on the other prong so there is nothing to defer to. Thus, the federal court will examine the remaining prong *de novo*. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (because no state court analyzed the prejudice prong, federal court analysis is "not circumscribed by a state court conclusion.") Therefore, to preserve the deference due to a State court decision, rulings must address the merits (or lack thereof) of each prong of the *Strickland* test.

B) OTHER CONSTITUTIONAL CLAIMS RAISED IN PCR PETITION:
This is where preclusion under Rule 32.2(a)(2) and (a)(3) come into play.

TRIAL DEFENDANTS:

-- Rule 32.2(a)(2) preclusion applies if the claim was raised and adjudicated on the merits on direct appeal.
-- Rule 32.2(a)(3) preclusion applies if the claim could have been but was not raised on direct appeal.

PLEADING DEFENDANTS:

Except for IAC and "involuntary plea" claims, all other constitutional claims will be precluded by entry of valid plea.

Rule 32.1(b): The court was without jurisdiction to render judgment or to impose sentence.

2007 Comment: "Paragraph (b) retains the basic attack on jurisdiction universally recognized as a ground for collateral attack. See ABA, Standards, supra, at § 2.1(a)(iii)."

Claim of illegal sentence does not implicate court's subject matter jurisdiction. *State v. Bryant*, 219 Ariz. 514, ¶ 17 (App. 2008)

This ground is subject to preclusion under Rule 32.2(a). *But see Rojas v. Kimble*, 89 Ariz. 276, 279 (1961) (subject matter jurisdiction cannot be waived and may be raised at any time).

Rule 32.1(c): The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law.

Cognizable: Illegal, excessive sentence or probationary term.
State v. Peek, 219 Ariz. 182, 183, ¶ 8 (2008).

Not cognizable: Request to modify or terminate probation.
State v. Dean, 226 Ariz. 47, 51, ¶¶ 10-11 (App. 2010).

This Rule does not permit attacks on the conditions of imprisonment, correctional practices, or prison rules.

This ground is subject to preclusion under Rule 32.2(a)(3): *State v. Shrum*, 220 Ariz. 115, 118 (2009) (illegal-sentence claim is subject to preclusion for failure to raise in timely or prior PCR).

Rule 32.1(d): The person is being held in custody after the sentence imposed has expired.

To be a cognizable claim, Δ must establish that he is in custody when he should otherwise be physically released from imprisonment—and not "released" to begin serving a consecutive sentence. *State v. Davis*, 148 Ariz. 62, 64 (App.1985)

Includes claims of miscalculation of sentence or computation of early-release credits *that result in Δ's remaining in custody when he otherwise should be free.*

Is not intended to include attacks on the conditions of imprisonment, correctional practices, or prison rules.

Rule 32.1(e): Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence.

"Simply because defendant presents the court with evidence for the first time does not mean that such evidence is 'newly discovered.'"
State v. Mata, 185 Ariz. 319, 333 (1996).

The Rule sets out a 3-part test, which Arizona case law has elaborated into a 5-part test. Δ must satisfy each requirement to be entitled to relief under this Rule.

(1) the evidence was discovered after trial although it existed before trial;
(2) that it could not have been discovered and produced at trial through reasonable diligence;
(3) that it is neither cumulative nor impeaching, unless the impeachment evidence substantially undermines critical trial testimony;
(4) that it is material; and
(5) that it probably would have changed the verdict or sentence.

State v. Bilke, 162 Ariz. 51, 52–53 (1989);
State v. Mauro, 159 Ariz. 186 (1988);
State v. Amaral, 2016 WL 423761 (Ariz. Feb. 4, 2016) (advances in juvenile psychology and neurology made long after conviction for crimes committed as a juvenile do not constitute a colorable claim or newly discovered evidence where the trial court considered the distinctive attributes of youth at sentencing).

-- The trial court may properly assess the credibility of the new evidence in determining whether or not it would have probably changed the outcome at trial.
State v. Serna, 167 Ariz. 373 (1991).

Rule 32.1(f): The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part.

"Freebie" PCR – has no preclusive effect on future PCR proceedings; is a procedural device only seeking relief in the form of filing a delayed notice of appeal (non-pleading defendants) or 1st "of-right" PCR notice.
State v. Rosales, 205 Ariz. 86 (App. 2003).

--Δ must prove by preponderance of the evidence that failure to timely file was NOT his fault (if any doubt, ask for an evidentiary hearing).

--This Rule does not apply to a non-pleading Δ who had a direct appeal and then files an untimely PCR notice.

Rule 32.1(g): There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence.

1. **Arizona statutes are presumptively not retroactive:**
   Unless a statute is expressly declared to be retroactive, it will not govern events that occurred before its effective date." Thus, absent a clear expression of retroactivity, a newly enacted law applies only prospectively.
   Garcia v. Browning, 214 Ariz. 250 (2007).

2. **Appellate decisions:**
   a) **What is a "significant change in the law"?**
      An appellate decision that breaks new ground; imposes a new obligation on the States or the Federal Government, or was not dictated by precedent existing at the time the Δ's conviction became final.
      Saffle v. Parks, 494 U.S. 484 (1990);
      State v. Towery, 204 Ariz. 386 (2003);
      State v. Shrum, 220 Ariz. 115, 118 (2009):
         change in the law requires some transformative event, a "clear break" from the past."

   b) **If it is a new rule, does it apply to this Δ?**
      i) Is it a substantive change? *If YES, applies to everyone.*
      Substantive law/rules:
         --define crimes;
         --address burdens of proof, "quantum of evidence" to convict;
         --determines length or type of punishment;

      E.g.: An appellate decision interpreting a statute in a way that de-criminalizes conduct for which Δ was convicted is a new substantive rule. *See Bousley v. U.S.*, 523 U.S. 614 (1998);

Montgomery v. Louisiana, 136 S. Ct. 718 (2016): When a new substantive rule of constitutional law controls the outcome of a case, the constitution requires state collateral review courts to give retroactive effect to that rule.

ii) Is it a procedural change? *If YES, does <u>not</u> apply to final convictions.*
Procedural rules:
--relate to fact-finding procedures to ensure a fair trial;
--manner, means, method of proceeding.

Finality: occurs when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.
State v. Towery, 204 Ariz. 386 (2003).

iii) Only new "watershed" rules of criminal procedure apply retroactively. TO DATE, the United States Supreme Court has yet to find a new rule that falls under this exception, but in "providing guidance" as to what might qualify, has pointed to the right-to-counsel rule of *Gideon v.Wainwright*, 372 U.S. 335 (1963).
Beard v. Banks, 542 U.S. 406 (2004)

EXAMPLE OF "SIGNIFICANT CHANGES" THAT APPLY RETROACTIVELY:

Montgomery v. Louisiana, 136 S. Ct. 718 (2016): holding that its decision in *Miller v. Alabama* prohibiting mandatory life sentences without parole for juvenile offenders applies retroactively.

EXAMPLES OF "SIGNIFICANT CHANGES" THAT DO NOT APPLY RETROACTIVELY:

Ring v. Arizona, 536 U.S. 584 (2002) (*Ring II*), which held that a jury must decide whether aggravating circumstances exist in capital cases, was a significant change in the law that did not apply retroactively to those Δs whose cases were final.
State v. Towery, 204 Ariz. 386 (2003).

Padilla v. Kentucky, 130 S. Ct. 1473 (2010), applying *Strickland* to immigration advisement was a significant change in the law for purposes of Rule 32.1(g) but it did not apply retroactively to convictions that were final when the new rule was announced.
State v. Poblete, 227 Ariz. 537, 539 (App. 2011).

Blakely v. Washington, 542 U.S. 296 (2004), does not apply retroactively to cases on collateral review. *State v. Febles*, 210 Ariz. 589, ¶¶ 1, 11 (App.2005).

Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively to persons whose convictions were final when the rule was announced.

State v. Sepulveda, 201 Ariz. 158, ¶ 4 (App. 2001).

Rule 32.1(h): "Actual innocence"

The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Comment to 2000 Amendment: The addition of new subparagraph (h) is warranted by the U.S. Supreme Court's pronouncement that claims of actual innocence are not cognizable under the federal habeas corpus remedy. *Herrera v. Collins*, 506 U.S. 390 (1993). This claim is independent of a claim under subparagraph (e). A defendant who establishes a claim of newly discovered evidence does not need to comply with the requirements of subparagraph (h).

TO DATE, no reported case addresses the substance of an actual innocence claim. However, *State v. Swoopes*, 216 Ariz. 390, 404 ¶¶ 46–47 (App. 2007), is an example of how that defendant pointed to non-compelling evidence in an unsuccessful attempt to prove his innocence.

VII. THE PLEADINGS:

A. DEFENDANT'S NOTICE:

--"The court shall provide notice forms for commencement of all post-conviction relief proceedings." Rule 32.4(a).

--Request for appointment of counsel should be made in the notice.

B. REQUEST FOR PREPARTION OF TRANSCRIPTS:

--If proceedings were not previously transcribed, Δ may request same on form provided by the clerk of the court. Rule 32.4(d)

--Court shall order only those that it deems necessary to resolve the issues.

PRACTICE POINT: even in absence of Δ's request, trial court should order transcripts of settlement conferences, *Donald* advisements, change of plea and sentencing proceedings whenever a plea is challenged and/or when an IAC claim regarding plea negotiations is raised even if Δ was later convicted at trial (these proceedings generally are not transcribed for direct appeal purposes).

C. DEFENDANT'S PETITION:

1. DECLARATION REQUIRED BY RULE 32.5:

--Petition must include a declaration by Δ stating under penalty of perjury the information in the petition is true to the best of his/her knowledge and belief.

NOTE: The 2014 amendment to Rule 32.5 eliminated the requirement that Δ certify that the petition includes every ground known to him.

2. Δ's AFFIDAVIT:

--Facts within Δ's personal knowledge must be separately alleged.

--Facts are those necessary to support the claims in the petition:

e.g.: in plea context, Δ must state that he would/would not have accepted/rejected plea, etc.

--Failure to submit factual affidavit is evidence that the claim not colorable.

3. OTHER ATTACHMENTS:

-- Rule 32.5 requires the attachment of "[a]ffidavits, records or other evidence" to support the allegations contained in the petition.

-- Bare allegations without supporting evidence are insufficient to show a colorable claim. *State v. Borbon*, 146 Ariz. 392, 399 (1985); *State v. Donald*, 198 Ariz. 406, ¶ 17 (App. 2000).

4. 25-PAGE LIMIT, absent court's permission to exceed page limit.

5. NO AMENDMENTS permitted after the petition has been filed *except* by leave of court upon showing of good cause–after the PCR petition has been filed. Rule 32.6(d).

6. DEFICIENT PETITIONS – Rule 32.5:
   - Trial court must return petition to Δ for revision
   - Δ has 30 days to refile compliant petition or risk dismissal w/ prejudice
   - State's response time begins on date compliant petition is refiled

D. STATE'S RESPONSE – Rule 32.6(a):

1. FILING DEADLINE: 45 days after the petition is filed.
2. TIME EXTENSIONS: upon showing of extraordinary circumstances.
3. 25-PAGE LIMIT: absent court's permission to exceed page limit.
4. ATTACHMENTS:
   -Rule 32.6(a) permits the State to submit affidavits, records or other evidence that contradict the allegations in the PCR petition.

E. DEFENDANT'S REPLY:

1. FILING DEADLINE: 15 days after receipt of State's Response.
2. TIME EXTENSIONS: upon showing of extraordinary circumstances.
3. NO NEW CLAIMS MAY BE RAISED.
   New claims presented for the first time in Δ's reply are waived/precluded; impermissible attempt to amend petition without leave of court.
   State v. Lopez, 223 Ariz. 238 (App. 2009)

VIII. THE PROCEEDINGS:

A. SUMMARY DISMISSAL – Rule 32.6(c):

Court may dismiss if it finds from the pleadings and record that all of Δ's non-precluded claims are frivolous, *i.e.*, petition presents no material issue of fact or law and that it would not be beneficial to continue the proceedings.

B. EVIDENTIARY HEARING – Rule 32.8:

Court must order hearing if "colorable claim":
"The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence."
State v. Amaral, 239 Ariz. 217, 220, ¶ 11 (2016) (emphasis in original)

The decision whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court."
State v. D'Ambrosio, 156 Ariz. 71, 73 (1988).

C. BURDENS OF PROOF AT EVIDENTIARY HEARING – Rule 32.8(c):

Defendant: must prove allegations of fact by preponderance of evidence.

State: if Δ proves a constitutional defect, the State must prove the defect harmless beyond a reasonable doubt.

D. MOTIONS FOR REHEARING – Rule 32.9(a):

Due 15 days after trial court's ruling issues

An aggrieved party must "set forth in detail the grounds wherein it is believed the court erred." *State v. Ramirez*, 126 Ariz. 464, 467 (App. 1980).

The purpose of a motion for rehearing under Rule 32.9 is to give the trial court an opportunity to correct any errors it may have made in the ruling on the petition for post-conviction relief. That purpose is not served when the party fails to point out to the court how it erred, and instead merely re-alleges the contentions already rejected by the trial court. In such an instance, the trial court is effectively denied its opportunity of meaningful review of its decision.

E. PETITIONS FOR REVIEW – Rule 32.9(c) and (g):

Filed in Arizona Court of Appeals: Rule 32.9(c)

Due 30 days after final decision on the PCR Petition or motion for rehearing.

-*State v. Pope*, 130 Ariz. 253, 255 (1981): The trial court may, after being presented with proper evidence, allow a late filing of petition for review if it finds that a petitioner has presented a valid reason justifying an untimely filing.

-Motions to extend time to file petitions for review shall be filed in and ruled upon by the trial court.

-Petitioner must file notice with trial court within 3 days of filing.

-20 page limit.

Filed in Arizona Supreme Court: Rule 32.9(g) and Rule 31.19:
Due 30 days after court of appeals issues its decision
or 15 days after final disposition of motion to reconsider.

-Motions to extend time shall be filed in the Supreme Court R31.19(a)

-3,500 word limit if proportionately spaced typeface
-12 page limit if handwritten

-Attach copy of court of appeals decision.

F. STAY PENDING REVIEW – Rule 32.9(d):

If new trial ordered: order is automatically stayed if State files motion for rehearing or petition for review; stay in effect until final review is completed.

Δ may move for reconsideration of release conditions.
State ex rel. Berning v. Alfred, 186 Ariz. 403, 405 (App. 1996):
determination of release and release conditions are matters
the trial court may address at any time under Rule 7.

If any other relief granted to Δ: stay pending further review is discretionary with the trial or appellate court.

How

SPECIAL

IS YOUR

ACTION?

Diane Meloche
Appeals Bureau Chief
Maricopa County Attorney's Office
602-506-7422
meloched@mcao.maricopa.gov

CONTENTS

I. WHAT IS A SPECIAL ACTION?

- speedy, limited appellate review of non-final rulings made in superior court or justice/municipal court at pretrial, during trial, pre-sentencing, plea stage, post-conviction

- referred to as "extraordinary writ" because only extraordinary circumstances warrant SA relief

1) TWO TYPES:

i) simply known as "special action" – review discretionary

ii) statutory special action – particular statute creates the right to appeal that issue

Example: ARS§ 13–753 deals with a capital defendant's claim of intellectual disability, which could render him/her ineligible for the death penalty. Sub(I) provides that, within 10 days after the trial court makes its findings, either the State or the Δ may file a SA petition and the COA "shall exercise jurisdiction and decide the merits of the claims raised."

2) HOW DOES SPECIAL ACTION DIFFER FROM APPEAL? Flip side of the coin

APPEAL	vs.	SPECIAL ACTION
•§ 13–4032 limits State's right to appeal		•Any issue not covered by statute
•Mandatory appellate court jurisdiction		•Discretionary jurisdiction
•Full complete record available for review		•Only what parties include in Appendix
•Ariz. Rules of Criminal Procedure govern		•Rules of Procedure for Special Action and Rules of Civil Appellate Procedure
•time consuming		•quick turnaround (in theory)

3) PREREQUISITE FOR SA JURISDICTION:

No equally plain, speedy, and adequate remedy by appeal.

ARS 13–4032 provides the State with a statutory right to appeal:

(1) order dismissing count(s), indictment, information, or complaint

(2) order granting new trial

(3) ruling on question of law adverse to the State when Δ appeals after conviction

(4) order made after judgment affecting the State's or Victim's substantial rights (Victim must request if right is Victim's)

(5) illegal sentence – not authorized by statute
see State ex re. McDougall v. Crawford, 159 Ariz. 339 (App. 1989)

(6) evidence "suppressed" on constitutional grounds
see State v. Bajarano, 219 Ariz. 518 (App. 2008) (suppressed vs. precluded)

(7) judgment of acquittal that is entered after verdict of guilt

When is remedy by appeal <u>not</u> plain, speedy, or adequate?

- Older cases frame the issue as:
  - "justice cannot be satisfactorily obtained by other means"
  - under no rule of law can a trial court's actions be justified
  - appeal would be ineffective to correct error
  - purpose of the right would be lost by waiting for appeal

- Juvenile and child custody issues are ripe for SA review

- Common Issues raised by Δ:
  - denial of bond
  - motions for remand to grand jury Rule 12.9
  - double jeopardy claim after initiation of second proceeding
  - some speedy trial/Rule 8 claims
  - other compelling reasons, such as sentencing issue where very short sentence will be served before appeal concludes.

II. "QUESTIONS RAISED" — OR WHAT ISSUES WARRANT SA RELIEF?

3 QUESTIONS UNDER RULE 3

Rule 3(a)[i]

Whether RJ failed to exercise discretion which he has a duty to exercise.

→ TO COMPEL PERFORMANCE OF A DISCRETIONARY ACT

NOT that the judge is required to exercise discretion in a particular manner, but only that he exercises it.

Example: failure/refusal to adjudicate a motion.
e.g.: fails to rule on Δ's motion under Rule 13.4(b), severance as a matter of right.

Rule 3(a)[ii]

Whether RJ failed to perform a duty required by law as to which he has no discretion

→ TO COMPEL PERFORMANCE OF A MANDATORY DUTY

Examples:

- Rule 17.4(g): Automatic change of judge if plea withdrawn after submission of presentence report upon request by Δ
- Rule 10.2: Timely motion for change of judge as matter of right
- Refusal to give Δ opportunity to withdraw plea if court rejects plea agreement in whole or in part.

Rule 3(b)

Whether RJ has proceeded [formerly certiorari]
or is threatening to proceed [formerly prohibition]
without or in excess of jurisdiction or legal authority.

Examples:

- clear statute of limitations violation (w/o jurisdiction)
- proceeding under wrong venue (w/o jurisdiction)
- grants untimely Rule 12.9 motion to remand to GJ (w/o legal authority)
- orders Victim to submit to defense interview (w/o legal authority)

If you can frame your issue under Rule 3(a) or (b) – do so.

"Bright line" standards, so more likely to get jurisdiction & relief.

Rule 3(c)

Whether RJ's decision was arbitrary and capricious or an abuse of discretion.

- Just what is "discretion"?

> "Judicial discretion has been defined as the power of decision, exercised to the necessary end of awarding justice, based upon reason and law, *but for which decision there is no special governing statute or rule.*"
>
> > *Santanello v. Cooper*, 12 Ariz. App. 123, 468 P.2d 390 (App. 1970) *vacated on other grounds*, 106 Ariz. 262, 475 P.2d 246 (1970) (emphasis added).

- So, what's an abuse of discretion?

> misapplies the law; predicates decision upon irrational basis; manifestly unreasonable

- Requires *your* objective, professional judgment in assessing whether ruling is abuse.

> "I disagree with the ruling" is not sufficient reason to seek SA relief
>
> Even if ruling is wrong, harm must be clear and "urgent"
> *e.g.*: preclusion of crucial evidence or testimony
> jury instruction clearly misstates the law.

- Majority of SA issues will fall under Rule 3(c).

III. TELL ME WHY YOUR ISSUE IS *SO* SPECIAL — PERSUASIVE FACTORS

MORE = BETTER

- No adequate remedy by appeal
  and harm cannot be "undone"

- Statewide Importance
  your issue is more "special" if it has broad impact on the practice of criminal law, as opposed to the impact it has on your specific case.

- Substantial Public Importance
  your issue is "special" because it involves public policy considerations

- Issue of First Impression
  your issue is "special" because no other Arizona court has addressed it

- Pure Question of Law:
  - construction of Constitution, Statue, or Rule
  - interpretation of new statute or rule

  Examples: issues involving Victim's rights
  ever-changing DUI law
  impact of AMMA in DUI cases
  "new" Evidence Rule 702/*Daubert*

- Issues likely to arise again
  inconsistent ruling

PRACTICE TIP: Don't simply recite factors in litany form:

- Back up your special circumstances with detailed, solid reasons;
- Point to evidence of how widespread the problem is/will become;
- Explain policy considerations;
- Attach minute entries of inconsistent rulings on same issue.

IV. EXAMPLES OF ISSUES RIPE FOR SA CONSIDERATION:
NO RIGHT TO APPEAL + SPECIAL FACTORS

- Interpretation of a constitutional, statutory, or rule provision

- Victim's Rights issues

- Bail / Pretrial detention

- Probable Cause/Grand Jury remand rulings

- Questioning of Jurors – grand and petite

- Change of Judge as matter of right Rule 10.2

- Right to Jury Trial

- Disclosure Order / Sanction rulings

- Evidentiary rulings –
  Special Action: Evidence PRECLUDED on non-constitutional grounds
  Appeal: Evidence SUPPRESSED on constitutional grounds
  e.g. 4th, 5th, 6th Amendment as basis for suppression

- Jury Trial Instructions if incorrect as matter of law

- Assertions of privilege

- Disqualification of Counsel

- Plea agreement challenges

- Sentencing Issues:
  - Striking of State's sentence enhancement/aggravation allegations
  - Refusal to find "same occasion"
  NOT to be confused with imposition of an illegal sentence, which is appealable
  e.g., sentence actually imposed is illegal (wrong statute; inadequate proceeding)

- Rule 32 Post-Conviction Proceedings:
  - enforce Rule 32.4 – PCR should be assigned to sentencing judge where possible
    State ex rel. Corbin v. Superior Court, 138 Ariz. 500, 675 P.2d 1319 (1984).
  - no discovery orders in post-conviction proceedings
    Canion v. Cole, 210 Ariz. 598, 115 P.3d 1261 (2005)
  - setting evidentiary hearing on a clearly precluded claim.

V. TIMELINES OF FILING A SPECIAL ACTION:

- Rules of Procedure for SA do *not* impose time limits for filing.

- LACHES:
  - may be the only restriction on the time for filing a SA petition.
  - equitable doctrine may bar claim if unreasonably delay results in actual prejudice to the adverse party

    Harris v. Purcell, 193 Ariz. 409, 412, ¶ 16, 973 P.2d 1166, 1169 (1998).
    State ex rel. McDougall v. Tvedt, 163 Ariz. 281, 787 P.2d 1077 (App. 1989)

- PRACTICE POINT: Undue delay undermines claim that your issue is "special"

DISTINGUISH *State v. Mahoney*, 25 Ariz. App. 217, 542 P.2d 410 (App. 1975):
Held: when a criminal prosecution is dismissed, the 20-day time period for taking appeal applies to the State's SA.

NOTE that an order dismissing counts/indictment is now appealable under 13-4032(1)

VI. STAY OF PROCEEDINGS/ORDERS — RULE 5

MERE FILING DOES NOT STAY TRIAL PROCEEDINGS OR COURT ORDER

1) WHEN DO YOU NEED ONE?

- nearing court-imposed deadline (*i.e.*, court-ordered disclosure deadline)
- firm trial date on near horizon = 6 weeks or less
- jury empaneled and jeopardy attached = true emergency

2) CRITERIA FOR GETTING ONE — what to argue:

RULE 65 governing temporary restraining orders & preliminary injunctions applies:

A party seeking a preliminary injunction must show:

- a strong likelihood of success on the merits [*prima facia* case; not certainty]
- a possibility of irreparable injury for which there is no adequate remedy
- a balance of hardships weighing in petitioner's favor
- stay will not deprive RPI of any rights
- public policy favoring the requested relief.
- enforcement of constitutional rights is w/in the public policy of AZ

Shoen v. Shoen, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App.1990);
Smith v. Ariz. Citizens Clean Elections Comm., 212 Ariz. 407, 411, ¶ 10, 132 P.3d 1187, 1191 (App. 2006)

3) PROCEDURE:

i) Must ask trial court first; get written minute denying request;

ii) If trial court grants stay, no further action need be taken.
If trial court denies stay, must file Stay Motion with COA
(note: SA petition must be filed at same time as Stay request)

iii) [Div. 1] Follow directions in Order Setting Dates
Generally, Petitioner is responsible for coordinating telephonic conference w/ opposing counsel & court panel

iv) Know the facts and procedural history
Be prepared to argue the merits of the issues raised in SA

If stay is necessary & granted → one foot is in the door

If stay is necessary but denied → unlikely that jurisdiction will be accepted

4) "EMERGENCY" ACTION --- LOGISTICAL NIGHTMARE:

You need to file SA petition mid-trial & trial court denies your stay request

Stay Motion + SA Petition = must be filed in COA simultaneously

If relevant transcript cannot be obtained on expedited bases,

- File "bare bones" Petition, explaining urgency
- Attach affidavit(s) signed by Prosecutor setting forth facts & circumstances
- Avow to file transcript as soon as possible.

VII. PARTIES TO A SPECIAL ACTION

RULE 2 AND RULE 4(C):

Caption will look similar to this:

[*Aggrieved Party*]

Petitioner,

v.

Honorable [*name*], a Judge/Commissioner
of the Superior Court of the State of Arizona,
in and for the County of [*name*],

Respondent,

and

[*Prevailing Party*],

Real Party in Interest

---/

1) **PETITIONER:** Can be the State, the Defendant, or the Victim.

2) **RESPONDENT:** (RJ)
Judge/Commissioner/JP who made the order being challenged.
If more than one involved, name each one; COA is w/o jurisdiction to grant relief against unnamed Respondent.

SEE: *Hickox v. Superior Court,* 19 Ariz. App. 195, 505 P.2d 1086 (App. 1973):
Rulings made by various judges on a peremptory challenge for change of judge:
Petitioner failed to join one of the judges as a party respondent, so COA was
w/o jurisdiction to grant relief against him.

Respondent Judge has only a "nominal" interest in the proceeding and lacks standing to appear and advocate the correctness of a contested ruling. That task fall to the Real Party in Interest, who has a justiciable state in the outcome of the SA.

Can RJ ever have standing to appear? (*e.g.*, Petitioner & RPI agree relief should be granted):

YES if "Defense-of-police response": RJ defends the general validity of an underlying administrative practice, policy, or local rule.

NO if "I-ruled-correctly response": court cannot assert validity of resolution of a particular issue in the case.
see Hurles v. Superior Court, 174 Ariz. 331, 849 P.2d 1 (App. 1993)

3) **INTERVENTION** – Rule 2(b)

- intervener has actual interest in outcome and not adequately protected by the existing parties.

See Rule 24, Ariz. R. Civ. P., which provides for intervention when intervener claims an interest and disposition of the special action may impair or impede intervener's ability to protect that interest.

Example: If Victim is Petitioner and names only the State as RPI, Defendant could intervene.

4) **AMICUS CURIAE**— Rule 7(f):

- amicus has a more general interest in outcome of the issue.

TIMING: No express time limit:
File as expeditiously as possible after SA petition filed;
Rule 16, Ariz. R. Civ. App. P. controls:

HOW: Any party except the State:
1) by written consent of all parties or
2) by leave granted by court upon motion

Motion for Leave to Participate and Brief of Amicus = filed together

Motion for leave:
identify interests of the applicant
state that applicant has read petition
state reasons why amicus brief should be accepted

Brief: Rule 16(a). Ariz. R. Civ. App. P.: max 12,000 words/proportionately spaced
otherwise, Rule 13 & 14 apply

Response to Motion for leave? → no provision in Rules

Response to Brief: Rule 16 allows 20 day after order granting motion for leave to file but should be prepared to file ASAP due to short turn-around in SA

Oral Argument: participate only by leave of appellate court.

VIII. WRITING THE SPECIAL ACTION PETITION OR RESPONSE:

Rule 7(e) RPSA requires the following sections:

I. **Jurisdictional Statement** which should address:

a) Appellate court's subject matter jurisdiction:

This Court [court of appeals] is authorized to consider a Petition for Special Action under Article 6, §§ 5 and 9 of the Arizona Constitution, A.R.S. §§ 12-2021 et seq., and Rules 1, 3, 4, and 7, Arizona Rules of Procedure for Special Actions.

b) Why SA jurisdiction is appropriate:

While this Court's decision to exercise its special action jurisdiction is highly discretionary, *Haas v. Colosi*, 202 Ariz. 56, 57, ¶ 2, 40 P.3d 1249, 1250 (App. 2002), the State submits that this Court should accept special action jurisdiction in this case for the following reasons.

1) Jurisdiction is appropriate where there is no equally plain, speedy and adequate remedy by appeal. See Rule 1(a), Arizona Rules of Procedure for Special Actions; *Alejandro v. Harrison*, 223 Ariz. 21, ¶ 6, 219 P.3d 231, 233 (App. 2009). The State has no right to appeal the Respondent Judge's order [*e.g.*, requiring disclosure of confidential information.]

2) Cite cases where SA jurisdiction has been granted on similar issues.

3) Briefly recap the "special circumstances" issue of first impression; pure issue of law, etc.

II. **Statement of the Issue**:

Frame the issue relevant to the Rule 3 "Question(s)"
keep it simple, clear, and concise;

III. **Statement of Facts and Procedural Background**:

Include citations to the record (*e.g.*, Appendix Item X, at y.)

IV. **STANDARD OF REVIEW**: provide it even though not required by Rule 7(e)

de novo if issue of law: constitutional/statutory construction
deference to factual findings if supported by record and not clearly erroneous
abuse of discretion =

V. **ARGUMENT**:

-elaborate arguments presented to trial court
-include citations to authority and record

IV. **CONCLUSION**:

-not required by Rule 7(e) but has more impact as a separate section rather than appearing as the last part of the argument.
-reiterate relief requested: accept jurisdiction and grant relief

Rule 7(e) Miscellaneous:

Copy of decision from which relief is requested must be attached to Petition
-not included in Appendix

10,500 word limit
Double spaced; 14 pt. proportional font
Certificate of Compliance (Petition, Response, Reply)

RESPONSES TO SA PETITIONS:

Same format as the Petition

Jurisdictional Statement:

contradict claim of "no remedy by appeal" where applicable
rebut "special factors"

Relief requested:

Deny jurisdiction; but if jurisdiction accepted, deny relief

Appendix: include relevant items not supplied by Petitioner.

REPLY: Rule 7(d)

No reply by Petitioner unless directed by the court
If permitted: 5,250 word limit

IX. MAKING YOUR RECORD & WHY THIS IS IMPORTANT:

1) WHAT IS THE RECORD - GENERALLY

i) Anything said in open court on the record: (transcripts)
- Testimony
- Argument
- Stipulations
- **Recapture in-chambers discussions ASAP on the record:
  "Your honor, as I understand the conversation from chambers, you are saying _____."

ii) Anything filed in the court file:
- Pleadings
- Motions & Responses
- Jury Instructions
- Court Rulings (minute entries)
- Presentence reports & recommendations

iii) Offers of Proof:
If evidence is precluded without a hearing, you must make an offer of proof of:
- what the evidence is,
- why you need it,
- what it would have established.
- Present your excluded witness out of the jury's sight to make your offer of proof
- Include every legal argument in support of your position

iv) Motion for Reconsideration:
Excellent opportunity to get any "second thoughts" into the record.

2) WHAT IS THE RECORD FOR SA PURPOSES — APPENDIX

i) Consists of *only* those items submitted by the parties by inclusion in the Appendix.
- Necessary for the appellate court to understand the facts and procedure of the case
- Must cite to the record in the SA Petition

ii) Should consist of:
- relevant written motions & responses
- relevant exhibits admitted at evidentiary hearings
- relevant written court rulings
- relevant transcripts (any time the issue was discussed on the record)

It's almost impossible to establish ABUSE OF DISCRETION on an inadequate record.

X. WHERE TO FILE:

Rule 4(a): Special Actions can be initiated in
Arizona Supreme Court
Court of Appeals
Superior Court

Rule 4(b) Venue:

If brought in Superior Court, file in county where RJ sits;
If brought in COA, file in court that has territorial jurisdiction over your county.

Rule 7(b):
File petition in lowest level appellate court (*e.g.*, COA rather than ASC);
Otherwise, Petitioner must explain why the petition is being filed in this higher level court.

- A decision to deny jurisdiction is *not* a decision on the merits, so Petition can be refiled in lower appellate court.

- Court of appeals has SA jurisdiction in capital cases prior to imposition of sentence.

- Direct filing in the ASC is "exceptional" but contemplated under Rule 4(a)
  → must be exceptional/unusual circumstances
  See Cronin v. Sheldon, 195 Ariz. 531, 991 P.2d 231 (1999)
  was issue of first impression + pure law + statewide significance affecting employees & employers throughout AZ

  → Div 1 and Div 2 issued inconsistent rulings on same issue

XI. FURTHER REVIEW
RULE 8

Jurisdiction denied: **NO** motion for reconsideration permitted
Comment to Rule 8; Rule 22(d)(3), Az. R. Civ. App. P.

Relief denied/granted: YES motion for reconsideration permitted w/in 15 days
Rule 22(b), Az. R. Civ. App. P.

Rule 8(a): Review of Decision of Superior Court by Court of Appeals:

- by appeal, when that remedy exists
  ARS § 12-2101;
  State v. Bayardi, 230 Ariz. 195, 281 P.2d 1063 (App. 2012)

- by special action if no remedy by appeal

- If in doubt as to which way to go, cite
  Robinson v. Kay, 225 Ariz. 191, ¶ 7, 236 P.3d 418 (App. 2010)
  "Although we lack appellate jurisdiction, we may nevertheless exercise our discretion to accept special action jurisdiction."

CAVEAT: Special Action is not a substitute for an appeal.

Rule 8(b): Review of Decision of Court of Appeals by ASC:

- by "Petition for Review of a Special Action Decision of the Court of Appeals"

  - Rules 22, 23, Az. R. Civ. App. P. control:
  - Petition: file within 30 days of decision
    - 3,500 word limit
    - attach copy of COA decision or Sup Ct decision if COA declined juris
    - appendix separately bound if more than 15 pages
  - Response: filed within 30 days of service
  - Reply: None unless ordered by ASC (Rule 23(e), Az. R. Civ. App. P.)

- new Special Action only when "exceptional circumstances" make petition for review inadequate. *See State ex rel. Neely v. Sherrill*, 168 Ariz. 469, 471, n. 1 (1991)

- Motion for Stay or Expedited Review can be filed in ASC

- If ASC grants review, it may
  - consider and decide merits
  - remand to court of appeals
  - make "other dispositions"

  Rule 23(i), Az. R. Civ. App. P.

Standards of Review:

- If SA jurisdiction declined by COA or Superior Court:
  - order denying jurisdiction is reviewed for abuse of discretion

  Bilagody v. Thorneycroft, 125 Ariz. 88 (App. 1979)

- If SA jurisdiction accepted and merits were addressed:
  - *de novo* review of legal conclusions;
  - abuse of discretion, and
  - deference to factual findings viewed in light most favorable to sustaining those findings.

XII. ASC — MOTION FOR RECONSIDERATION

RULE 9

When ASC accepts jurisdiction and issues merits decision:

- No motion for reconsideration if decision states that it becomes effective immediately *or* that mandate shall issue immediately

- Yes motion for reconsideration within 15 days if decision states that it becomes effective after mandate issues.

- Response to motion for reconsideration: due 15 days after service of motion.

AN APPELLATE PRIMER:

The ABC's of Appeals, Special Actions, & Post-Conviction Relief

May 4, 2012
Black Canyon Conference Center
Phoenix, Arizona

STATE'S APPEALS

Presented By:

JACOB LINES
Deputy Pima County Attorney
Tucson, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Rd., Suite 202
Phoenix, Arizona 85015

APAAC Appellate Primer
May 4, 2012

State's Appeals
Presented by Jacob R. Lines
Deputy Pima County Attorney
Jacob.Lines@pcao.pima.gov

You have received an unfavorable ruling. What do you do?

I like to start with three questions.

1) Why was the judge wrong?

Specifically identify what the judge ruled, why he or she ruled that way, and why you believe it is incorrect.

Is it a question of fact? For example, did the judge accept the Defendant's version of events rather than the officer's version of event?

Is it a question of law? For example, did the judge interpret a statute or rule and rule against you solely on that basis?

It makes a big difference because of the standard of review that will be employed. We will talk about that later.

2) What facts are necessary for our argument?

For example, for an argument that a piece of evidence was seized legally because it was in plain view, we need facts about the officer being in the place legally and about the evidentiary value of the evidence being immediately apparent.

Other examples?

3) Where are those facts in the record?
What is "the record"? Let's look at Rule 31.8(a)(1):

> The record on appeal to the appellate court shall be a certified transcript, all documents, papers, books and photographs introduced into evidence, and all pleadings and documents in the file – (other than subpoenas and praecipes not specifically designated), and if authorized by the appellate court, an electronic recording of the proceeding.

In other words, the record is the court's file plus transcripts. So, if the facts that we need for the argument are not in the pleadings or presented in an evidentiary hearing, we have a problem.

> **TIP**: disclosure is not part of the record. If you have an argument about disclosure, make sure you get specifics in the record, either at an evidentiary hearing or in a pleading. Otherwise, you only have lawyers' arguments in the transcript, and the appeals courts might not find that convincing.

Appeal or Special Action?

Not everything is appealable. By that, I mean that we do not have a right to appeal everything. The State's right to appeal is strictly limited to constitutional or statutory provisions that clearly grant that right. *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990); *State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 340, 767 P.2d 226, 227 (App. 1989), *citing State v. Lelevier*, 116 Ariz. 37, 567 P.2d 783 (1977).

Our appeals statute is A.R.S. § 13-4032:

An appeal may be taken by the state from:

1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
2. An order granting a new trial.
3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request.

5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.

6. An order granting a motion to suppress the use of evidence.

7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

> **NOTE**: subsection 3, the cross-appeal provision, is not as big as it looks. It only grants a right to appeal if we win at trial and then the defendant appeals. Then, the appeals court is only likely to address your issue if they reverse the conviction and remand. Otherwise, they have no need to address it because you already won at trial and it their decision would have no practical effect.

The takeaway lesson is: if it isn't in the statute, then we can't appeal it. You might think about a special action instead. *See State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App. 2008).

<u>Should</u> we appeal this?

Once you figure out that you can appeal something, the question becomes whether you should appeal it. Here are a few of the factors that prosecutors should consider when deciding whether to appeal:

Justice

Effect on victims

Availability of resources

Ethics

Likelihood of success

The standard of review

Bad facts/good facts?

Effect on future cases

Picking the right battles

Any other factors?

Other alternatives: motions to reconsider, rethink trial strategy
And remember – appellants are supposed to lose appeals.

How to appeal
File a notice of appeal. For a sample, email me. If the case is still pending (e.g., the judge suppressed evidence but the case is still alive), file a motion to dismiss for purposes of appeal, citing *State v. Million*, 120 Ariz. 10, 12-15, 583 P.2d 897, 899-902 (1978). This avoids leaving the defendant, and the case, in trial-court limbo during the appeal and guards against speedy trial claims later.

When to appeal
You must file your notice of appeal "within 20 days after the entry of judgment and sentence," or, in a cross-appeal, "within 20 days after service of the appellant's notice of appeal." Ariz. R. Crim. P. 31.3. This means that you must file your notice within 20 of the order being appealed. A motion for reconsideration does not extend the time for the notice. If your notice of appeal is late, the Court of Appeals has no jurisdiction to hear your appeal. *See State v. Limon*, 229 Ariz. 22, 23, ¶¶ 4-6, 270 P.3d 849, 850 (App. 2011).

> TIP: Do you think a motion for reconsideration may work, but worry whether the court will rule in time for you to file a notice of appeal? Try this: file your motion but still file a notice of appeal within your 20 days. Then ask the Court of Appeals to revest jurisdiction in the trial court so it can decide the motion for reconsideration.

What next?
After you file your notice of appeal, file a designation of transcripts within 5 days of your notice. In that designation, list the transcripts that need to be prepared and who the court reporter is for each transcript. Look at Rule 31.8(b)(4) for details. File it in Superior Court and send a copy to the court reporters. From there, the reporters will file the transcripts with the Court of Appeals.

Then what?
When the record is complete, the Court of Appeals will send you an order telling you when your opening brief is due (40 days from the day of that order). Ariz. R. Crim. P. 31.13(a). The appellee will have 40 days to respond, and you will have 20 days to reply. After the briefing is finished, the appeal will be "at issue" and you can start waiting. You can expect to wait for at least a month, usually more, after the briefing is done. In my last 10 appeals, the Court ruled, on average, 2.2 months after the briefing was done.

> **TIP**: for cases involving victims, advise them up front about how long appeals take. Explain the process so they understand why it takes so long.

Your briefs

According to Rule 31.13(c), your opening brief must have the following:

- A table of contents
- A table of citations
- A statement of the case (can be combined with statement of facts)
- A statement of facts (WITH citations to the record)
- A statement of the issues presented for review
- An argument (WITH the proper standard of review and citations to relevant authority)
- A short conclusion stating the precise relief sought.
- An appendix if desired.

Some limited writing advice:

- Remember your audience. It is a panel of dispassionate judges, not a jury.
- Remember your standard of review. This is the question the judges will be asking. In other words, they will not be asking, "Was the State right about this argument?" They will be asking, "Can the State prove from this record that the trial court was wrong to rule like this?"
- Ask for help if you need it.
- Keep it short.

Questions of law, such as interpretation of constitution, statute, or rule, are reviewed de novo. *State v. Nichols*, 224 Ariz. 569, 572, ¶ 12, 233 P.3d 1148, 1151 (App. 2010); *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 7, 210 P.3d 1283, 1285 (App. 2009); *State v. Kelly*, 210 Ariz. 460, 461, ¶ 3, 112 P.3d 682, 683 (App. 2005).

A motion to dismiss is reviewed for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004).

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, 81, ¶ 25, 235 P.3d 227, 234 (2010); *State v. Tucker*, 205 Ariz. 157, 165, 68 P.3d 110, 118 (2003); *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995).

Motions to suppress are reviewed for an abuse of discretion, deferring to the trial court's factual findings but reviewing the legal conclusions de novo. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004).

Findings of fact are upheld unless they are "clearly erroneous." *State v. Burr*, 126 Ariz. 338, 339, 615 P.2d 635, 636 (1980).

After the decision

You get the decision. You win (congratulations!) or you lose (I'm sorry). The next step is a petition for review. Our supreme court is not a court of error. It exists, for the most part, to declare the law. It does not exist to fix every error that may still exist in a case after the Court of Appeals is done. Because of that, a petition for review must explain persuasively why the court should hear the case.

Rule 23(c)(3) of the Arizona Rules of Civil Appellate Procedure explains why petitions may be granted:

> the fact that no Arizona decision controls the point of law in question, a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

In other words, if you want to petition for review, you have a difficult job ahead of you. Look back at those same factors you considered in deciding to appeal. Then it is a good idea to ask someone who has been there before (I like emailing the AG's Office). Send an email to APAAC if you would like some additional perspectives.

If you decide to file a petition for review, you have 30 days to do so. Your petition is your chance to explain to the court why the issue in your case is important enough for it to hear. It is not necessarily about the merits of the case, but about the importance of the issue presented. See Rule 23 of the Civil Appellate Rules for details. The appellee will have 30 days to respond. Then, you wait again. Our supreme court takes a couple of months to decide whether to take review of a case. If it accepts review, it will set a time for briefing on the merits and oral argument. If the court declines review, a mandate will issue from the Court of Appeals, sending your case back to the trial court.